1593 No. 5618

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

1587

FEDERAL SURETY COMPANY, A CORPORATION,
Appellant,

vs.

ALBERT LALONDE, R. E. PECK AND WILLIAM POWERS,
Appellees.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

APPELLANT'S BRIEF.

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STATEMENT.

This case was commenced by the respondents in the United States District Court for the District of Montana as an action at law to recover from the appellant and one C. H. Windsor amounts claimed to be due on account of the execution and delivery of a certain bond to the respondents. The defendant, C. H. Windsor, was not served with process and did not appear. A stipulation waiving a jury trial was filed and the case was tried to the court without a jury. At the conclusion of the testimony the respondents requested the court for findings of fact and order for judgment for the defendant on all the issues tendered by the pleadings. The motion was denied and ex-

ceptions thereto were taken. Thereafter and on the 15th day of June, 1928, judgment was filed in favor of the respondents and against the appellant in the sum of $11,272.35 and for costs and disbursements in the amount of $570.05. The case is now before this court for hearing on the appeal prosecuted by the appellant.

STATEMENT OF FACTS.

The respondents, a copartnership doing business under the firm name of LaLonde, Peck and Powers, were engaged in road construction work. On September 12th, 1924, the contractors entered into a contract with the state of Montana for the construction of a portion of a highway (R., pp. 74 to 79). The state promised to pay to the contractors for this work approximately the sum of $64,918.55 (R., p. 75). In conformity with the Montana statute, on the 12th day of September, 1924, the respondents, as principals, and the Federal Surety Company, as surety, executed and delivered to the state of Montana a bond in the sum of $32,459.27 to indemnify the state against any loss it might sustain by reason of the failure of the respondents to complete the project, and also to guarantee the payment of claims to third party materialmen and laborers (R., pp. 213 to 215).

The respondents never performed any of the work under their contract with the state of Montana, but on the 27th day of October, 1924, entered into a written subcontract with C. H. Windsor under the terms

of which Windsor promised and agreed to construct the highway in consideration of receiving from the respondents 87½% of the amount which the contractors were to receive under their contract with the state of Montana (R., pp. 80 to 87).

On the 27th day of October, 1924, C. H. Windsor, as principal, and the Federal Surety Company, as surety, executed and delivered to the respondents a bond in the penal sum of $28,500.00 to indemnify the contractors on account of any loss they might sustain by reason of the failure of C. H. Windsor to carry out the provisions of the contract in the foregoing paragraph described (R., pp. 88 to 92). This bond contained a condition that if C. H. Windsor defaulted in the terms of his contract with the respondents, that then and in that event the appellant would have the right at its option to proceed with the performance of the contract, and that if it should elect to complete said contract it should thereupon immediately be subrogated to all rights of the principal and of the respondents in and to all payments due at the time of the default or thereafter to become due under the contract (R., pp. 89 and 90).

The original contract between the state of Montana and the respondents required the completion of the project on or before November 1st, 1925 (R., p. 75). Approximately ten days before the time specified for completion, Windsor ceased work on the project (R., p. 97, see also memorandum decision of the court). The trial court found that most of the work had been done for a distance of about seven miles (see memorandum decision). The contract re-

quired the completion of approximately 10.68 miles (R., pp. 74 and 75).

On or about October 24th, appellant exercised the option contained in its bond delivered to respondents and proceeded to complete the contract. The parties agreed that the surety would not by taking over and completing the work waive any rights it had (see memorandum decision of the trial court, see also Exhibit 8, R., pp. 104 and 105; Exhibit 9, R., pp. 106 and 107).

The surety proceeded to complete the work. Certain payments of the 12½% specified in the Windsor contract were paid by the surety to respondents. In the course of the completion of the work the surety actually expended for labor, supplies and miscellaneous items which were incident to and necessary for the completion of the work a sum in excess of the amount actually paid by the state for the entire contract. The surety's deficit exceeds the amount of the penalty of the Windsor bond.

This action was brought by the plaintiff to recover the unpaid balance of the 12½% claimed by the plaintiff to be due under the Windsor contract (R., p. 5), certain overpayments made by the respondents to Windsor (R., p. 4), and certain amounts for premiums that had been assessed by the state against respondents for workmen's compensation insurance (R., p. 7).

In the course of the trial the court received over the objection of the respondents evidence as to the amounts paid by the surety in connection with the completion of the work and as to the necessity for

the payment thereof. This was offered pursuant to the terms of the Montana statute authorizing the giving of evidence by an auditor. The trial court in its memorandum decision apparently refused to consider this evidence on the theory that there was no proper foundation laid for it (see memorandum decision of the trial court).

It is the contention of the appellant that respondents cannot recover in this action because appellant has already expended in connection with the construction of the project, a sum in excess of the penalty of its bond.

A consideration of this question necessarily involves a consideration of the appellant's contention that the court erred in refusing to consider certain evidence introduced by the appellant concerning the payment of certain amounts for labor and material. These errors are hereinafter particularly stated in the next subdivision of this brief.

SPECIFICATION OF ERRORS.

1. The court erred in granting plaintiffs' motion for judgment in its favor.

2. The court erred in finding generally in favor of the plaintiff.

3. The court erred in concluding that defendant was not entitled to judgment.

4. The court erred in ordering and directing entry of such judgment.

5. The court erred in entering judgment herein in favor of the plaintiff.

6. The court erred in failing to make findings in favor of the defendant and in failing to direct the entry of judgment and in failing to enter judgment in favor of the defendant herein.

7. The court erred in refusing to order judgment for the defendant at the conclusion of plaintiffs' case.

8. The court erred in refusing to enter judgment for the defendant at the close of the plaintiffs' case.

9. The decision of the court herein is not supported by the evidence and is contrary to law.

The foregoing assignments of error will be relied upon by the appellant to present to this court for its determination the following questions:

a. The appellant, having expended more than the contract price received by Windsor under his contract with appellees, can the appellees recover the twelve and one-half per cent of the contract price?

b. The appellant, having expended more than the penalty of its bond in completing the work, can the appellees recover anything in excess of the amount of the penalty of the bond?

10. The court erred in sustaining plaintiffs' objection to the introduction of the testimony of defendant's witnesses with reference to the amount and the reasonable value of the amount expended by the defendant in completing the project, the substance of said evidence being as follows:

> D. A. Crichton.—I had charge of the completion of the project for the defendant. I made payment by checks for necessary labor or material. Payments were largely made on orders

issued by someone in charge of the camp. The orders were sent to a bank. Then they notified me and I would pay the amount of these orders. I issued approximately one thousand checks and there were approximately two thousand orders issued. Some checks were given in payment for camp supplies. I usually paid the merchant direct for these. In October, 1925, I acquainted myself with the prevailing prices in the vicinity of this particular job for the particular kind of labor, material, supplies, equipment and rental for equipment required on the job. In every instance I paid the prevailing prices. By prevailing prices I mean the market price at which the materials and supplies were obtained. We got the best price obtainable. These prices were the reasonable prices for these various items. I knew and was acquainted with the prevailing and market prices for labor, materials, supplies and rental and knew what these prices were on October 23, 1925, and after that time during the construction of the work.

As far as I know, everything that was purchased went into that job. All of the labor which was hired, all the supplies, materials, parts, which were delivered, for which I issued checks in payment, were utilized on the job.

I assisted Mr. Toole in making an audit of my books, checks and orders. Checks, consisting of Exhibits 49 to 63, inclusive, were paid by me for the Federal Surety Company.

Mr. Toole.—I have been a civil engineer since

1914. I have had experience in making audits. I have audited a number of contracts. I have been in the State Highway Commission. I have made audits of books of account in connection with my work with the State Highway Commission or other contractors or other companies. I have checked miscellaneous data with reference to this particular kind of job. My experience has extended over a period of five years. During the last three years particularly, my work has been on these trouble cases.

I made an audit of the books and records of D. A. Crichton and of the Federal Surety Company to ascertain the expenditures and disbursements on this job. This audit covered a period of time after October 24, 1925. I went into all of their records, receipts and disbursements. I have computed in that audit the amounts that were expended by the Federal Surety Company for labor and material, which was paid for after October 24, 1925. I have that audit and those deductions with me. In making the audit it was necessary to include over one thousand checks and work orders exceeding that number. I am able from the audit to segregate the items labor and services. I have computed these items to be $38,583.77.

Exhibit No. 49 is a bundle of checks issued on the job in payment of labor and services from which my audit covering these items was made. My audit shows that the total amount paid by the Federal Surety Company for supplies was

the sum of $19,945.76. Defendant's Exhibit 50 are the checks and orders covering the purchase and payment of this item of supplies used on the Windsor work.

My audit shows defendant paid $1,423.77 for materials on this job. The checks showing payment are in Defendant's Exhibit No. 51.

My audit shows the defendant paid for repairs on this job the sum of $3,487.87. Defendant's Exhibit No. 52 is the bundle of checks covering this item from which I made my audit.

My audit shows that the defendant paid $7,131.34 for hauling. The checks from which I made this audit is Defendant's Exhibit No. 53.

My audit shows payments by the defendant for tools and equipment in the sum of $3,529.08. The checks in payment of this item are Exhibit No. 54. These tools and equipment were used in this work.

My audit shows that the defendant paid for freight and express $184.18. The checks in payment are Defendant's Exhibit No. 55.

My audit shows that the defendant expended $653.24 for insurance paid and Defendant's Exhibit No. 56 contains the checks which were issued in payment for this item.

The audit shows that defendant expended $140.00 for traveling expenses. Defendant's Exhibit No. 57 contains the checks issued in payment of this item. These traveling expenses were for traveling to and from the Windsor work.

The audit shows that defendant expended $719.07 for expenses for Thomas Cline, who is an engineer of the Federal Surety Company and who was on the job for a part of the time. Checks, drafts and vouchers in payment of this item are contained in Defendant's Exhibit No. 58. Cline was on the work after October 24, 1925.

My audit shows payment by the defendant of $310.96 for expenses of F. M. Toole. Toole was on the job in July, 1926. He was an engineer for the Federal Surety Company. He went there for the purpose of organizing the work and inspecting its progress. Defendant's Exhibit No. 59 contains the drafts in payment of traveling expenses of Mr. Toole.

My audit shows the defendant paid $127.92 for telephone and telegrams. The checks in payment are contained in Defendant's Exhibit No. 60.

My audit shows that the defendant paid $90.72 for board for laborers. Checks in payment are contained in Defendant's Exhibit No. 61.

My audit shows that defendant paid to employment agents. Checks in payment are contained in Defendant's Exhibit No. 62. These checks were given to an employment agency for fare advanced for a ticket for a laborer.

My audit shows that the defendant paid $198.39 for miscellaneous items. These checks are contained in Defendant's Exhibit No. 63.

I procured all of these checks and these exhibits from the home office of the Federal Surety Company, some of the records in the office of D. A. Crichton and others from the records kept on the job.

The insurance item covers insurance for public liability and workmen's compensation. Insurance was carried on trucks that were used on the job and generally insurance against accidents that might happen to the general public.

11. The court erred in sustaining plaintiff's objection to the introduction of certain testimony of the defendants with reference to the necessity of amounts expended by defendant in completing the project, the substance of said evidence being as follows:

Mr. Crichton.—I supervised the job by going up there every two weeks. I inspected the job whenever I went there, conferred with the engineer, Highway Department and foreman in charge of the work. I ascertained what was needed on the job in the way of labor, materials, supplies, parts and rentals. During the progress of the work I looked over the work and looked over the supplies and materials and so on to determine for myself what was necessary in the way of labor, materials, supplies, equipment and parts. I observed and made an examination to determine what was necessary. I went to Browning on an average of once every two weeks. I would go over the job from one

end to the other to see who was working and what remained to be done and what provisions were being made to get the work finished, inspecting it as thoroughly as I could. I made an examination of the supplies and materials. Practically all of the material was purchased by Mr. Windsor or Mr. Powers, but it was not paid for by them. We had to pay for a lot of material they had purchased. That material went into the job. In a general way I would make an examination of these trips to determine whether camp supplies had been delivered. We instructed the foreman to buy necessary supplies and to be sure they got there. When the bills came in and before they were paid the foreman checked the bills. Then checks were issued in payment. In a general way I observed that these supplies were getting to the job. I feel quite certain that everything that was purchased went into that job. I observed whether or not the equipment and number of men were on the job were necessary. From my observation all the labor that was hired, all the supplies, materials, parts and rentals, which were delivered and for which I issued checks, were necessary for this job.

If this court should be of the opinion that the testimony offered under assignments of error numbered 10 and 11 should have been received, there is but one question left for this court's determination, namely, the appellant having expended more than the pen-

alty of its bond in completing the work, can the respondents recover in this action a sum in excess of the penalty of the bond? For the purpose of brevity, we are treating assignments of error numbered 10 and 11 hereinafter in our argument in connection with the foregoing general question.

ARGUMENT.

I. The Appellant Having Expended More Than the Penalty of its Bond in Completing the Work, Respondents Cannot Recover in This Action.

In the course of the trial the appellant produced certain testimony and introduced in evidence certain exhibits showing the amounts expended by the appellant in connection with the construction of the work, the necessity therefor and the reasonable value thereof.

In the trial court's memorandum decision a statement was made by the court that it did not consider this testimony admissible, that no proper foundation had been made, all in connection with appellant's counter-claim. No mention was made by the trial court in its decision as to whether or not this testimony was admissible in connection with the defenses alleged by the appellant.

This evidence was material, not only in connection with appellant's counter-claim, but also in connection with appellant's defense that respondent had expended more than the penal sum of its bond in completing the contract.

We are treating, therefore, the sufficiency of the foundation for the introduction of this testimony and these exhibits hereinafter under this general division of this brief under a separate subdivision.

It is the appellant's contention that the appellant having expended more than the amount named in its bond in connection with the completion of the work, and the expenditure of this amount having inured to the benefit of the respondents, that they cannot recover in this action. To substantiate this contention it will be necessary to consider the testimony quoted under assignments of error numbered 10 and 11.

As will hereinafter be seen, the Montana statute in force at the time of the trial of this action authorized the reception of this evidence.

On or about October 24, 1925, the appellant, after conferring with respondents, took over the completion of the work. They did this after making an agreement with respondents that by so doing it would be without prejudice to assert any of their rights (see decision of the court, Plaintiff's Exhibit No. 8, R., pp. 104, 105; Plaintiff's Exhibit No. 9, R., pp. 106, 107). Prior to appellant's taking over the work, after Windsor had ceased work, respondents refused to complete the project except as agent for the Federal Surety Company (R., pp. 99, 100, 101).

The surety by reason of the execution of the first bond to the Highway Department was obligated to complete the respondents' contract with the state, and this irrespective of the bond delivered by it to the respondents. The respondents, therefore, hav-

ing refused to go on with the work, except for the Surety Company, the appellant was forced to act. Approximately ten days remained to complete the work within the time specified in the original contract. It, therefore, exercised its option and took over the completion of the contract. It is undisputed that the work was afterwards completed by the appellant.

A. *In connection with the construction of the work the surety expended, in addition to the amounts received from the Highway Department, a sum in excess of the penalty of its bond.*

The Highway Department paid to respondents before the surety took over the work the sum of $18,540.92 (R., p. 146). Subsequent to appellant's taking over the work the Highway Department paid to the Federal Surety Company the total sum of $37,700.27 (R., p. 146). In addition to these amounts so paid the Highway Department delivered to the clerk of the District Court for Lewis and Clark county the sum of $9,463.85. This amount was paid to the clerk in an interpleader suit, a number of claimants for material and supplies furnished and labor performed asserting claim to this fund (R., p. 152). The state deducted $1,200.00 for additional engineering expenses (R., p. 148).

Conceding for the purpose of argument that the claims as filed in the interpleader suit are not valid claims against this fund, and that the surety will ultimately receive the $9,463.85 deposited with the clerk of the District Court in the interpleader suit,

the total amount received or to be received by the surety is the sum of $47,164.12.

B. *Amount expended by surety to complete work.*
(Assignment of Errors X and XI.)

The testimony of D. A. Crichton, a witness for the defendant, stands uncontradicted as to the manner in which payment for labor, material and supplies was made (R., pp. 234-244, 280). This witness had charge of the construction work for the appellant. Payment for the necessary labor or materials on the job was made by him from his office in Great Falls. He actually issued the checks. The orders for payment of labor or material would be sent to a bank in Great Falls and Crichton would issue the checks. Approximately two thousand checks were issued. He had acquainted himself with the prevailing prices for the different kinds of labor, material, supplies, equipment and rental of equipment, and the prices that he paid were the prevailing prices for these items. All of the items so paid were necessary for the completion of the work. He went to the job from time to time and conferred with the Highway Department, the engineer on the job, the foreman in charge of the work and ascertained what was needed on the job in the way of labor, material, supplies, parts, rentals, etc. He determined from time to time from looking over the supplies and materials what was necessary in the way of labor, material, supplies, equipment and parts. All the items for which checks were issued were necessary for the work (R., pp. 234-244). Afterwards this same witness assisted

Mr. Toole in making an audit of these checks. This witness testified that at the time the audit was made he examined the various checks that were involved in the audit.

"Q. You assisted Mr. Toole in making this audit?

A. Yes, sir.

Q. And at the time the audit was made, you went over the various checks that were involved in the audit?

A. Yes, sir.

Q. Did you see some checks presented here this afternoon being Exhibits 49 to 63, inclusive.

A. Yes, sir.

Q. Were those checks paid by the Federal Surety Company?

A. Yes, sir.

Q. And by you?

A. Yes, sir.

Q. And charged to the Federal Surety Company when you paid them yourself?

A. Yes, sir.

Mr. Hurd: I want my line of objection to go to all of this testimony.

The Court: Oh, yes, that is understood. That all of this testimony goes in under your general objection" (R., p. 280).

Mr. S. M. Toole, a witness for the defendant, testified that he made an audit of the books and records of D. A. Crichton to arrive at a balance of correct deductions for expenditures and disbursements (R.,

p. 256). He produced the checks that were signed by D. A. Crichton and these were offered and received in evidence subject to the objection of respondents (R., pp. 256-271). Checks which were paid for the various items on the job were received in evidence as Exhibits Numbered 49 to 63, inclusive (R., pp. 260-271). D. A. Crichton testified that these checks signed by him were paid by the Federal Surety Company and by the witness and were charged to the Federal Surety Company when he himself paid the checks (R., p. 280). The actual amount of expenditures made by the appellant in connection with the completion of the contract as shown by these checks and this audit was the sum of $76,531.87, made up of the following items:

Labor and Services	$38,583.77	(R., p. 260)
Supplies	19,945.76	(R., p. 261)
Materials	1,423.77	(R., p. 262)
Repairs	3,487.87	(R., p. 262)
Hauling	7,131.34	(R., p. 263)
Tools and Equipment	3,529.98	(R., p. 264)
Freight and Express	184.18	(R., p. 264)
Insurance	653.24	(R., p. 265)
Travel Expense	140.00	(R., p. 266)
Thomas Cline	719.07	(R., p. 267)
F. M. Thul	310.96	(R., p. 268)
Telephone and Telegraph	127.92	(R., p. 268)
Board for Laborers	90.72	(R., p. 269)
Employment Agency	5.80	(R., p. 270)
Miscellaneous Items	198.39	(R., p. 271)
	76,531.87	

Conceding for the purpose of argument that the surety will receive the $9,463.85 which has been deposited by the Highway Department with the clerk of the District Court for Louis and Clark county, the deficit of the surety to date exceeds the penalty of the bond. The account of the surety on the job at present stands as follows:

Amount actually expended by the surety in connection with the completion of the work (R., pp. 260 to 271)		$76,531.87
Amount received by the surety from the state of Montana (R., p. 146) ...	$37,700.27	
Amount surety may receive from the clerk of the District Court involved in the interpleader suit (R., p. 152)	9,463.85	47,164.12
Deficit of surety.....		$29,367.75

The deficit of the surety, therefore, at the present time is the sum of $29,367.75, an amount in excess of the penalty of its bond. If the District Court for Louis and Clark county ultimately holds that the claimants to this fund have a prior right to it, the surety's loss will be increased by the amount allowed to claimants by the District Court of Louis and Clark county.

The penalty of the surety's bond was the sum of $28,500.00 (R., p. 88).

C. *The liability of the surety cannot exceed the penalty of its bond.*

The amount expended by the surety in connection with the completion of the work necessarily inured to the benefit of the respondents. If the surety had not expended this amount, it would have been necessary for the respondents under their contract and bond delivered to the state of Montana to expend this amount in completing the project. The surety, being obligated under its bond delivered to the state of Montana, was obliged to complete the work, and the amounts expended by it were expended for the benefit of the respondents.

It is elementary that the liability of the surety cannot be increased beyond the plain unambiguous terms of its bond.

See *Babcock v. Wilcox & American Surety Co.* (C. C. A., 8th Cir.), 236 Fed. 340.

U. S. v. Mace (C. C. A., 8th Cir.), 281 Fed. 635.

D. *Under the Montana statute an auditor may testify concerning deductions made from an audit.*

As hereinbefore appears, appellant's witness, Crichton, testified concerning the manner in which payments were made, the necessity for the payments, and concerning the reasonable value of the items as paid. He also testified that he assisted Thul in making the audit and in making this audit the actual

checks which were issued in payment by him were considered. The deductions given by the auditor were made from the actual checks produced in court and introduced in evidence (R., pp. 260 to 271). There is no testimony contradicting the testimony of the witnesses Crichton and Thul that these checks were actually issued. The checks themselves are in evidence (R., pp. 260 to 271).

At the time of the trial of this case there was in force and effect in the state of Montana a statute known as Subdivision 5 of Section 10516, Revised Code of Montana of 1921, which was as follows:

> "There can be no evidence of the contents of a writing other than the writing itself except in the following cases * * * (5) Where the original consists of numerous accounts or other documents which cannot be examined in court without great loss of time and the evidence sought from them is only the general result of the whole."

The testimony concerning deductions made from the audit related to a number of checks. The checks examined in order to arrive at this deduction were in excess of a thousand.

> "Q. Approximately how many checks?
>
> A. I would say something over a thousand checks" (R., p. 258).

The evidence introduced conformed with the requirements of the above quoted section of the statute. The original records consisted of numerous ac-

counts or other documents, there being over a thousand checks. They could not be examined in court without great loss of time, and the evidence sought from them was only the general result of the whole, *i. e.*, the actual amounts expended.

The Supreme Court of the state of Montana has had occasion to interpret this statute, and under the rule announced by that court the evidence offered and received in this case was admissible.

In the case of *Silver v. Eakins* (Montana), 175 Pac. 876, a cashier of a bank was called to testify concerning the status of an individual account. The court held that a copy of the original record was not admissible, but that the witness could testify concerning the general results, the balance deducible from computation. In its opinion, that court stated:

> "In so far as it was sought to show the general result merely—for instance, the balance deducible from computation—the witness was properly permitted to state what was shown by the ledger (Subdivision 5, Par. 7872), but the copies themselves were not admissible."

Section 1855, California Civil Code of Procedure of 1920, contains a provision which is identical with the Montana statute above quoted. This provision of the Montana code was adopted from the state of Montana. The Supreme Court of the state of Montana has uniformly held that it will adopt the construction put upon a particular portion of its code by the courts of the state from which the particular portion of its code was adopted.

See *Continental Oil Co. v. Montana Concrete Co.*, 62 Montana 223.
Stackpole v. Hallihan, 16 Montana 40.
Stadler v. First National Bank, 22 Montana 190.
Largey v. Chapman, 18 Montana 563.
McKeever, et al., v. Oregon Mortgage Co. (Montana), 198 Pac. 752.

The courts of California in construing their statute which is identical with the Montana statute, have uniformly held that where the audit was made from various documents by going over these documents and checking them with the original bills which were retained and which one of the parties knew had been paid, the deductions made from the audit were admissible in evidence.

In the case of *Globe Manufacturing Co. v. Harvey* (Cal.), 196 Pac. 261, the action was for breach of a manufacturing contract. The defendant's statement or summary of expenditures was admitted under the Code of Civil Procedure of California, Par. 1855, Subdivision 5, because the originals consisted of numerous accounts which could not be examined without great loss of time. This audit was made from original bills of the payment of which defendant had personal knowledge. This evidence was admissible and it was not necessary for the bookkeeper to testify concerning the correctness of the items, the defendant having had personal knowledge of the payment of the various items. In this decision the Supreme Court of Montana stated:

"Plaintiff assigns this as error for the reason

that the person who kept defendant's books did not testify to their correctness. The statement, or summary, was admitted under Subdivision 5 of Section 1855 of the Code of Civil Procedure, because the original consisted of 'numerous accounts or other documents, which cannot be examined in court without great loss of time.' Defendant maintains a card system of bookkeeping, and testified that he personally made up the statement in question by going over the cards and checking up the entries thereon with the original bills, which he retained and which he knew had been paid. Therefore the statement was, in fact, made from the original bills, of the payment of which defendant had personal knowledge, and defendant was competent to testify to the correctness of the items thereof upon his own knowledge, which he did. For this reason, testimony by the bookkeeper as to the correctness of the books of defendant was unnecessary and the statement was properly received in evidence."

In the case of *McPherson v. Great Western Milling Co.* (Cal.), 186 Pac. 803, the action was brought to recover half of the profits of the corporation. A witness, an auditor, testified concerning deductions made from an audit. An objection was made that the witness who was simply an auditor and not the accountant of defendant's business had not shown that the records on which the deduction was based was correct. The court held that there was no con-

tention that the statement was not correct as a summary of the books showed, that the party objecting had it in its power to show any error in the records in the trial court, the documents from which the audit was made being in court although not offered. The court held that the evidence was properly admitted. In its opinion the court stated:

> "The business was carried on under the name of the Orange County Supply Company, the books of which were in the possession of the appellant, and in court counsel for the appellant twice said he would offer them in evidence, but the formal offer was not made. The witness testified he had made the statement from the books. The ledger being shown him, he was asked if that was the book from which he got the data. He replied:
>
> 'I couldn't say. *The only way I could tell is by comparing the figures of the statement I made with the ledger.* I don't now recall whether this is the book or not.'
>
> He was not asked, nor afforded the opportunity to make the comparison. The specific objection to the statement was that the witness, who was simply an auditor, not the accountant, of the defendant's business, had not shown that the records on which the data was based were correct. There is no contention that the statement was not correct as a summary of what the books showed, nor that they were not correct. The appellant had it in its power to show any error in either in the trial court. The case was

one permitting the use of just such a summary as was introduced. Code Civ. Proc., Sec. 1855, Subd. 5."

In the instant case not only were the checks from which the audit was made in court, but they were actually introduced in evidence (R., pp. 260 to 271). The witness, Crichton, had testified that from his own personal knowledge he actually paid these checks, or the Federal Surety Company had paid them. There was no objection made as to the accuracy or correctness of the deductions. The evidence offered and received, we submit, was properly admissible under the section of the Montana statute.

Respondents attempted to introduce certain evidence concerning the reasonable value of doing the work if the work had been sublet by the surety to some sub-contractor (R., p. 298). The surety, under the facts that existed at the time it took over the work, in view of the refusal of the respondents to take over the work, was not obligated to sublet the work. The respondents acquiesced in the surety completing the project. They made no objection to appellant finishing it.

This witness in attempting to give his deductions as to the reasonable value of finishing the work did so by making his deductions from the estimates and assuming that the amount of work shown by the particular estimate had actually been completed. The same witness admitted that at least as to some of the work he had heard that it was not completed at the time the surety took over the work although pay-

ment had been allowed theretofore in an estimate.

"Q. Now, you said on your direct examination that you based your conclusion as to the amount of work remaining to be done on the estimates which you had in your possession?

A. Yes, sir.

Q. And based, that, assuming the fact to be that all the work which was shown by those estimates to have been paid for by those estimates, that is, from one to five or six, that all that work had actually been done prior to the Federal Surety Company taking over the work, did you not?

A. Yes, sir.

Q. You said that all of that work had been done, didn't you, on direct examination?

A. According to the estimates.

Q. But you know as a matter of fact that all that work as shown by those estimates had not been done on October 24, 1925, by Windsor, don't you, Mr. Powers?

A. I don't.

Q. Do you know about the culverts at station one hundred and three plus sixty-seven?

A. I couldn't say without looking at the profile.

Q. Of your own knowledge you know that the station at one hundred and three plus sixty-seven was not finished by Windsor at the time estimate number five and estimate number six were delivered?

A. I don't know of my own personal knowl-

edge. I have been told so" (R., pp. 302 and 303).

"Q. In making the deductions about which you testified a few moments ago, you said you relied on all these estimates, and computed the deductions from all the estimates, from one to twelve inclusive?

A. Yes, sir.

Q. Now, have you those estimates here?

A. I said that the estimates were cumulative, and that I had estimate six and estimate twelve.

Q. And you just made your deductions from both of these estimates?

A. (No response.)

Q. Do you know what the fact is as to whether or not estimate six shows payment up to ninety per cent of the full contract price, as the original contract price, estimate number six for all yardage, for excavation north of Kennedy Creek?

A. I do not.

Q. Giving the deductions of the reasonable value of doing the work, about which you testified, you based it solely upon the estimate number six and estimate number twelve, and the difference is shown by those estimates?

A. In arriving at the quantity?

Q. Yes.

A. I did.

Q. And you don't know whether the quantity is shown by estimate number six as having been removed or correct or not?

A. No, they were correct I assumed.

Q. And that would be true also to the item of clearing?

A. Item of clearing?

Q. Item of clearing. You based that upon the estimate also?

A. Yes, I have got personal knowledge of clearing.

Q. Would you say that all the clearing which was shown by estimate number six as having been done up to that time was actually done on October 24th, when the Federal Surety Company took over this work?

A. Practically so.

Q. What do you mean by 'Practically so'?

A. Well, there may have been some brush to burn, and a little clearing to do, but the clearing was practically done.

Q. There was not an acre of clearing to be done, or burning to be done?

A. Oh, there might have been an acre, not over that, not grubbing, but clearing, burning the brush.

Mr. Melrin: Now, your Honor, at this time, we move to strike out all the testimony of this witness with reference to the reasonable value of doing this work, on the ground that it is incompetent, irrelevant and immaterial, and the witness has shown that he is not qualified to give an opinion as to value, not being famiilar with the conditions which existed at or near this project during the time the work was done;

the witness having stated that the weather conditions, and other conditions would have entered into it, and having admitted he was not there, he would not know what the conditions were" (R., pp. 303 to 305).

The witness was not near the work from the time it was taken over by the surety until it was completed (R., p. 297).

"Q. You were not near this work from October 24, 1925, until after its completion, were you?

A. I have not been near the work since September, 1925, to the present time."

The witness admitted that he did not know what the condition of the weather was at the location of the work from the time the surety took over the work until it was finished.

"Q. You don't know what the condition of the weather was, from October, 1925, until the date of completion, do you, at that place?

A. The condition of the weather?

Q. Yes.

A. From what time?

Q. From October, 1925, up to the date of completion, you never observed the weather there yourself?

A. No, I did not" (R., p. 297).

The witness admitted that weather conditions would affect the cost of doing the work if the work was not sublet.

"Q. You were not at Browning during that time, were you?

A. I didn't—I don't think I was through Browning, no.

Q. And the price for doing that character of work about which you have testified depends to a great extent upon the condition of the weather, does it not?

A. That depends upon whether you do the work yourself, or whether you sublet it.

Q. If you do the work yourself, it depends to a great extent as to the weather conditions?

A. It does. If you sublet you are not interested in the weather factor.

Q. If you do the work yourself, if you have rain or snow, it will alter materially the cost of the work, will it not?

A. It will" (R., p. 298).

The lower end of the project was about thirty-five to forty miles from a railway station (R., p. 298). The witness admitted that weather conditions taken into consideration this distance from a railway station would make a difference in computing the reasonable value of doing the work if the work was not sublet.

"Q. That is not my question. Wouldn't weather conditions, taking into consideration the fact that you were thirty-five miles from a railroad, your camp was, wouldn't those two factors taken into consideration make some difference in the computation of the reasonable

price at which work of this kind could be done?

A. Yes, the fact that you were thirty-five miles from a railroad, or from the American Railroad would be a factor.

Q. Yes, if you had any particularly bad weather there, and it was necessary to do your hauling from a railroad station over roads of the kind leading from the town to the railway station, to where the railway station is located, and from the railway station to the camp, it would make some great factor in the cause, would it not?

A. Yes, sir.

Q. Particularly in the spring of the year?

A. It would.

Q. And during the time that there would be snow on the ground?

A. During the time that there would be snow?

Q. Yes.

A. If there was snow on the ground it would be a factor."

The witness testified that the road leading from the railway station to the work would get in bad shape in case of rain.

"Q. Browning was the closest railway point at that time, where you had a road?

A. The road either way was just about the same.

Q. Just a trail?

A. Just a trail.

Q. And the road from the lower portion of this work to Browning was in what condition, in October, 1925?

A. Well, there were two roads; one was through the park, and one was down over the reservation.

Q. Could you haul materials through the park?

A. Yes.

Q. And what was the condition of that road?

A. That road is pretty good.

Q. Was it pretty good when you went outside the park itself?

A. Yes, up to Babb, it was.

Q. In case of rain there, that road would get in pretty bad shape, would it not?

A. Yes, at times" (R., p. 301).

At the time the surety took over the work, respondents admitted that a number of bills had been left unpaid on the job by Windsor.

"Q. Now, do you know at the time Windsor stopped work in October, how many bills had left unpaid on this job?

A. No, except from the bills, or statement of the bills that he presented.

Q. And do you know approximately how much those bills were?

A. I don't recall.

Q. They amounted to several thousand dollars, did they not?

A. I think they did" (R., p. 301).

Some of the labor and material bills were paid on that date.

"Q. What, if anything, did you do with reference to making payments for labor and materials on that day?

A. Well, we arranged to take care of them at once.

Q. Did you make any payments on that day?

A. Yes, sir.

Q. How much did you advance?

A. I don't recall now. We put the bills down, and at that time I had no money from the Federal, so I paid the labor with all I had myself, and asked Mr. Powers to advance me a little to pay off the remainder until such time as I either got the estimate from the state or money from the Federal to go ahead and make up the payments.

Q. And what did you do subsequently with reference to repaying Mr. Powers for the money so advanced on that day?

A. Shortly thereafter I sent him a check for what he had coming, for what he had advanced me.

Q. The amount that he had advanced you at Browning?

A. Yes, sir.

Witness: (Continuing.) That money that I paid out went to pay all labor that was furnished or performed on this particular job, on the so-called labor contract for the Babb-Carsdon road" (R., pp. 232 and 233).

All payments made by the surety company for labor and material or supplies necessarily inured to the benefit of the respondents since the respondents were liable therefor in view of their contract and bond which had been delivered to the state of Montana.

CONCLUSION.

At the time the appellant took over the work it was forced to take over and complete the project because of the execution and delivery to the state of Montana of its first bond. The respondents had refused to complete the work except as agents for the Federal Surety Company. The surety was not obliged to sublet the work but had the right to supervise and complete it. The payments that were made by the surety in connection with the claims which had already been incurred by Windsor inured to the benefit of the respondents, this in view of their contract and bond delivered to the state of Montana. The payments made by the surety after it took over the work for various items in connection with the work were necessary for the completion of the work. The amounts paid by the surety for the various items were the reasonable value of those items. Crichton, the agent of the surety company, for the completion of the work had personal knowledge of the payment of these items. The checks actually introduced in evidence were identical with the deductions made by the auditor. There was no attempt made to question the accuracy of the deductions as shown by the checks themselves. Crichton having testified to the

payments as of his own personal knowledge, the auditor was qualified to give his deductions. The amount actually received by the surety from the Highway Department amounted to the sum of $37,700.27. The amount delivered by the Highway Department to the clerk of the District Court in the interpleader suit amounted to $9,463.85. Giving the respondents the benefit of this $9,463.85 so deposited with the clerk of the District Court in the interpleader suit, the deficit of the surety at the present time exceeds the penalty of its bond. As a matter of fact if the Montana District Court in the interpleader suit holds that the claimants are entitled to the money deposited with the clerk of the District Court in the interpleader suit, the loss of the surety company will be increased by the amount deposited with the clerk of court.

We submit that a judgment should have been rendered for the surety company, and that it was error for the trial court to enter judgment for the respondents.

Respectfully submitted,

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